Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

v.

BOBBY GENE DRUMRIGHT,

Defendant-Petitioner.

NO. 76-215

PETITION FOR CERTIORARI

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June, 1976

In the

Supreme Court of the United States

UNITED STATES OF AMERICA, *Plaintiff-Respondent,* *v.* BOBBY GENE DRUMRIGHT, *Defendant-Petitioner.*	}	NO.

PETITION FOR CERTIORARI

COMES NOW, the Petitioner, Bobby Gene Drumwright, by and through his attorney, Allen J. Kincaid, and requests this Honorable Court to grant certiorari in the instant case and as grounds therefor states as follows:

I.

At the trial court level in the United States District Court for the District of Colorado, the Court issued an unofficial opinion in the form of an Order Denying Defendant's Motion for New Trial. Said opinion is marked Petitioner's Exhibit "A", attached hereto and incorporated herein. The United States Court of Appeals for the Tenth Circuit published an opinion pursuant to its review of this case which was reported. A copy of that opinion is marked Petitioner's Exhibit "B", attached hereto and incorporated herein.

II.

Petitioner seeks review of judgement affirming the conviction of Petitioner entered by the United States Court of Appeals for the Tenth Circuit on April 12, 1976, and the order denying Petitioner's Motion for Rehearing which was entered on May 21, 1976. Defendant-Petitioner shows to the Court that it has jurisdiction to review that judgement pursuant to 28 U.S.C. §1254 and Article III, Section 2 of the United States Constitution.

III.

The questions presented for review are as follows:

1. Whether the trial court erred in admitting Government Exhibit Two on the grounds that that bill was irrelevant and prejudicial and Government Exhibit Three on the grounds that chain of custody as to that bill was not established.

2. Whether the trial court erred in refusing to rule that Government's Exhibit Three could not be the basis for the crime charged because that bill does not "bear such likeness or resemblance to any of the genuine obligations or securities issued under the authority of the United States as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care dealing with a person supposed to be upright and honest."

3. Whether the court erred in failing to rule that the commission of the crime charged was impossible since a portion of Government's Exhibit Three was worth Fifty Dollars.

4. Whether the trial court erred in refusing to find as a matter of law that the evidence presented was insufficient to sustain a conviction.

5. Whether the trial court erred in not giving Defendant's tendered instruction dealing with the production or making of Government's Exhibit Three.

IV.

The Defendant-Petitioner was charged with violating 18 U.S.C. §472 which states as follows:

> "Whoever, with intent to defraud, passes, alters, publishes, or sells, or attempts to pass, alter, publish or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeit, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years or both."

V.

This appeal results from the United States Court of Appeals for the Tenth Circuit having affirmed a conviction of the Defendant-Petitioner for a violation of Title 18, U.S.C. §472.

The evidence showed that on November 27, 1974, the Defendant made a purchase of goods at the Tri-State Distributors Store in Wray, Colorado, and that the purchase was made with a partially torn $50 Federal Reserve Note.

The evidence further showed that on November 30, 1974, Defendant made a purchase of goods from Duckwall's Store in Wray, Colorado. That purchase was made with a single bill consisting of one-half of a Fifty Dollar Federal Reserve Note, one-third of a One Dollar Federal Reserve Note and a small portion of a different Fifty Dollar Federal Reserve Note.

Testimony showed that Defendant had obtained the two bills either from one of his renters or from the First National Bank of Wray, and that Defendant was carrying several $50 Federal Reserve Notes as a result of money received from these two sources. The Defendant was aware of the tear on the first bill used on November 27, 1974, but was unaware of the condition of the altered bill.

VI.

The basis for jurisdiction of the United States District Court for the District of Colorado was the charge that the Defendant had violated a federal statute, to-wit: 18 U.S.C. §472.

VII.

A. The government allegedly introduced the torn $50 Federal Reserve Note used in a November 27, 1974, purchase by the Defendant to establish intent and guilty knowledge. The evidence showed that that bill was torn and that a portion of that bill was attached to the $50 Federal Reserve Note that was used on November 30, 1974. All the evidence shows is that Defendant was in possession of both notes; however, the Government actually used that evidence to create an inference that since the Defendant had possession of both notes, he *made* Government's Exhibit Three, and therefore knew of its altered condition. The inference created by the introduction of the first note is a crime in itself and one with which Defendant was not charged. Thus, the only purpose for the introduction of the first note is to force an improper inference, and as such the note was irrelevant to the instant case, and its introduction was highly prejudicial to Defendant.

The second $50 Federal Reserve Note, the one which the Defendant was charged for passing, was improperly admitted into evidence since the chain of custody was broken. The evidence showed that the cashier who accepted the note did not look at it and was unable to identify the note as the same one as the one she accepted for the purchase. Further, she testified that she left for lunch and one or more persons would have been operating her machine in her absence, she did not deliver the bill to the manager, nor did she observe him take it from her register. Thus, what we have is a cashier who accepts a note she admittedly did not look at or examine and who did not see that note again. When her manager called her into his office to question her about an altered $50 Federal Reserve Note he had in his possession she assumed it was the one she accepted, but could not positively identify it as such.

B. In order to find the Defendant guilty of passing an altered or falsely made instrument the jury was instructed to determine whether the alleged fraudulent note bore such a likeness to a genuine obligation of the United States that it could have deceived an honest, sensible and unsuspecting person of ordinary observation and care. There was no evidence to support such a finding by any person or jury. The cashier who allegedly accepted the note stated that she did not look at it at all. The store manager who had possession of the note and first noticed its composition stated in his testimony that the spurious nature of Government's Exhibit 3 was immediately apparent to him. Thus, at no point in the record is it established that the note in any way resembled genuine currency.

C. An expert witness appeared on behalf of the Defendant and testified that the larger $50 portion of the note in question would in fact be worth $50. He stated further that the bill in its three piece condition would be suspect and would possibly be turned over to the Secret Service for investigation. In that event, he did not know for sure whether the recipient would ultimately get the $50 for the larger portion. The government, however, did not produce any rebuttal evidence by any member of the Secret Service to resolve that question. As the evidence stands then, the larger portion of the bill was worth $50 standing alone, and it was not shown conclusively that because that portion was part of a three piece note, it would not be redeemed. The Tenth Circuit United States Court of Appeals states that the value of an altered obligation is immaterial. Common sense tells one that the only purpose behind altering an obligation would be to obtain more money than the note was originally worth. Thus the value is crucial, and in the instant case, the note was worth the $50 it was passed as representing.

D. Taken as a whole the record at the trial court level is devoid of sufficient evidence to sustain a conviction and the court erred in failing to grant Defendant's motion for judgement of acquittal. There was no evidence sufficient for the jury to infer that Defendant had the intent to defraud anyone or had knowledge that the note was altered. The evidence in

the case at bar established that Defendant had possession of the Government's Exhibits Two and Three and that a note he had in his possession was given to a cashier for a purchase made. Passage of altered or counterfeit money alone is not sufficient to show the requisite guilty knowledge or intent to defraud. *U.S. v. Musquiz,* 445 F. 2d 963 (5th Cir. 1971). The evidence is this case at most created a suspicion of guilty knowledge, but this is not sufficient to support a conviction. *Miller v. United States,* 392 F. 2d 790 (10th Cir., 1968).

E. The trial court erred in not giving Defendant's tendered instruction dealing with the production or making of Government's Exhibit Three. By the introduction of Government's Exhibit Two and evidence that Exhibit Three was made up of a portion of Exhibit Two, the inference was clearly created that Defendant made up Exhibit Three and therefore, had guilty knowledge when he passed it. The least the Court should have done to reduce the prejudicial effect of that evidence was to give Defendant's instruction that Defendant was not accused of making Exhibit Three.

CONCLUSION

It is submitted that the instant case presents substantial questions of law that have not been and should be settled by this Court. Therefore, Petitioner respectfully requests this Honorable Court to grant the Petition for Certiorari.

Respectfully submitted,

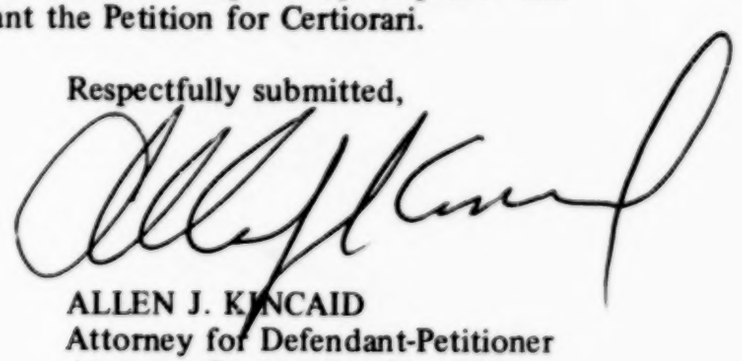

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EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Criminal Action No. 75-CR-53

UNITED STATES OF AMERICA,	)	
	)	**ORDER**
Plaintiff,	)	
	)	**DENYING MOTION**
v.	)	**FOR**
	)	**NEW TRIAL**
BOBBY GENE DRUMRIGHT,	)	
	)	
Defendant.	)	

We deny Defendant's Motion for a New Trial (or, Alternatively for an Order Directing the Entry of Judgment of Acquittal Notwithstanding the Verdict).

We have considered the individual grounds advanced by defendant in support of the motion and the grounds in their totality. The grounds advanced do not warrant the relief requested by defendant.

I.

The defendant was charged by indictment as follows: On or about November 30, 1974, at Wray, in the State and District of Colorado, Bobby Gene Drumright, with intent to defraud, did pass and utter to Lynetta Day, a falsely made and altered obligation of the United States, that is, a single bill made from one half of a fifty dollar Federal Reserve Note, one third of a one dollar Federal Reserve Note and a small portion of a different fifty dollar Federal Reserve Note, and the said Bobby Gene Drumright then knew the said note

to be falsely made and altered, all in violation of Title 18, United States Code, Section 472. (The three sections of the note were joined together by scotch tape). The note was passed at a Duckwalls' store in Wray Colorado to a store cashier, Lynetta Day.

Jury trial resulted in a verdict of guilty.

II.

The jury verdict of guilty is supported by substantial evidence and we find that there was no impropriety or error in the instructions read to the jury. The evidence elicited at trial was adequate to support the conviction.

III.

The government presented the following facts upon which the jury could find the defendant guilty. Two days before the offense charged in the indictment, the defendant passed an authentic ripped fifty dollar ($50.00) bill, government's Exhibit Number 2. He made a purchase with the bill and received cash for the balance of the bill. On the date of the offense, government's Exhibit Number 3 was recovered. The testimony at trial reflected that the smaller portion of a fifty dollar ($50.00) bill taped to Exhibit Number 3, was once a part of Exhibit Number 2. The evidence further reflected that the defendant flipped Exhibit Number 3 into the cash drawer when he made the purchase. The evidence also indicated that purchase was for less than $15.00 (from defendant's own testimony). It is reasonable to infer that a person passing the questioned bill (Exhibit Number 3) would know of the questionable condition of the bill. The guilt of defendant on evidence in the case was a jury question.

Defendant contends that the jury was improperly instructed in that the jury was not told by the court that the defendant was not charged with mere possession of an altered obligation of the United States. The jury was clearly instructed as to the elements of the offense and the exact offense that defendant was charged with.

IV.

Defendant contends that government's Exhibit Numbers 2 and 3 were improperly admitted into evidence. Exhibit Number 2 is questioned by the defendant because of its relevancy. The evidence indicated that defendant passed Exhibit Number 2 in Wray, Colorado, two days prior to his passing Exhibit Number 3. It was also shown by circumstantial evidence that part of Exhibit Number 3 was once a part of Exhibit Number 2. The relevancy of Exhibit Number 2 is apparent.

The chain of evidence of Exhibit Number 3 was established satisfactorily. Witness Day, cashier, testified the bill was placed in her cash register at the time of the purchase. She further testified that it was the only fifty dollar ($50.00) bill she received that day. Witness Marston (store manager) testified that he took all the cash from that register at approximately 3:00 the same day. At that time, there were no one hundred dollar ($100.00) bills and only one fifty dollar ($50.00) bill, (the bill that was marked government's Exhibit Number 3). Witness Day also testified that Exhibit Number 3 resembled the bill she saw on the date of the alleged crime. Exhibits 2 and 3 were relevant and clearly admissable.

V.

The court followed procedural requirements as prescribed in Rule 30 Fed. R. Crim. Proc. in regard to advising counsel of the court's intended jury instructions and also at the interval following the court's charge to the jury. No argument or objection was made by defense counsel in this regard. Defense counsel argues the fact, however, that two motions for judgment of acquittal were made in low tones at the bench.

Defendant argues that he was denied a fair trial because defense counsel was forced to make both of his motions for acquittal at the bench, rather than out of the presence of the jury. A cursory review of the record fails to reflect a request by defense counsel to have said motions argued out of the presence of the jury.

Assuming *arguendo* such a request was made, we can find no action or potential prejudice to the defendant from having the motions argued at the bench. These arguments were brief bench arguments in low tones, and we are satisfied that as a result of the physical characteristics in the court and lack of proximity of the jury to the judge's bench, it would be quite difficult for the jury to overhear the motion, comments by counsel, and court rulings. The court rulings on the motions were not made by the court in open court, and we are confident the jury was never advised of the rulings or overheard the argument or motions.

From time to time during trial both attorneys requested and were granted leave to approach the bench and present matters relating to the trial. These low tone brief bench conferences were to no degree prejudicial to the rights of defendant nor prevented a fair trial.

The Supreme Court has recently denied a similar defense contention in *Hamling v. United States*, 418 U.S. 87 (1974) as it related to a California District Court's failure to comply with Fed. R. Crim. Proc. Rule 30 by denying defense counsel's request to make additional objections to the court's instructions of the law out of the presence of the jury.

In regard to procedures to follow in argument on instructions, Mr. Justice Rehnquist states: "While that goal might be served in many cases by a sufficiently low-tone bench conference, the ultimate way to assure the goal is to comply with the rule" (Rule 30). *Hamling* page 134.

Defense argument on prejudice to defendant is without merit. Substantial rights of defendant were not affected. (Rule 52(a) Fed. R. Crim. Proc.)

The record reflects that the jury was cautioned on two occasions by the court that counsel's statements and arguments were not evidence in the case.

The record reflects the following:

> Mr. Davis, defense counsel, has made his Motion for Judgment of Acquittal at the Bench and Mr. Smith, U.S. Attorney, has responded and the Court has ruled. The following colloquy then took place:
>
> The Court: Make your opening statement. Let's go ahead.
>
> Mr. Davis: I would like to talk to this witness.
>
> The Court: (alluding to the jury)* We are going to take a very short recess, ladies and gentlemen.
>
> You have my assurance that when we discuss these matters, (at the bench)*, we are talking about phases of this case; you understand that, please? However, should you overhear part of the conversation, I am sure you understand that is not evidence in the case. The Court's statement and statements of the attorneys does not constitute evidence. The evidence comes from this witness stand under oath or exhibits you will be allowed to see. So you might overhear part of our conversation; we are generally talking about points of law or order of witnesses or some technical aspect of the case. It is necessary. It is either a question of sending and going back and forth or doing it here at the bench.
>
> I think you are entitled to that explanation, ladies and gentlemen. We are going to be in recess for several minutes, please.

At the end of the case, the court's final instruction to the jury was the following:

> The Court: These instructions contain the law that will govern you in this case and in determining the facts, you should consider only evidence given upon trial. Evidence offered at the trial and rejected by

*"Alluding to the jury" and explanatory words "at the bench" added by the court.

the Court should not be considered by you. The opening statements and arguments of the attorneys and remarks of the Court are not evidence in this case nor are the statements of the attorneys evidence in this case.

The Court does not by any words uttered during the trial and the Court by these instructions does not give or intimate or wish to be understood by you as giving or intimating any opinion as to what has or has not been proved in this case or as to what are or are not the facts in this case.

No single one of these instructions states all the law applicable to the case, but all of these instructions must be taken and considered as they are connected with and related to each other as a whole.

VI.

Defendant's allegation of improper comment by United States Attorney is without merit. The comment was fair. No prejudice resulted thereof.

VII.

Defendant contends that his conviction for violation of Title 18, United States Code, Section 472 should be reversed and he be granted a new trial because the bill he allegedly passed (government's Exhibit Number 3) was in fact worth $50.00. The defendant bases his claim on the testimony of a representative of the Federal Reserve banking system. The Federal Reserve Bank representative testified that had the part of the fifty dollar ($50.00) bill, which made up approximately one-half of government's Exhibit Number 3 been presented to him, he would have exchanged it for a complete $50.00 Federal Reserve Note. However, significantly, the Federal Reserve Bank representative also testified that had government's Exhibit Number 3 been presented to him in the condition which he saw it the day of trial (which was the

same condition in which it was presented the day of the alleged crime), he would not have accepted it in exchange for a complete fifty dollar ($50.00) Federal Reserve Note.

The evidence at trial does not support defendant's contention as to the value of Exhibit 3 (in its present condition). Government's Exhibit Number 3 consists of a part of a fifty dollar ($50.00) Federal Reserve Note, a part of one dollar ($1.00) Federal Reserve Note, and finally, a part of a different fifty dollar ($50.00) Federal Reserve Note. According to the Federal Reserve Bank representative, the Federal Reserve Bank under its regulations would not have accepted such a note in exchange for any United States currency.

We find counsel for defendant's argument without merit. The issues as to the validity and value of Exhibit Number 3 were fact questions. Defendant was properly charged and evidence supports the conviction.

VIII.

All other grounds for New Trial and Post Trial Relief are DENIED as being without merit.

DATED at Denver, Colorado, this 15th day of May, 1975.

BY THE COURT:

SHERMAN G. FINESILVER, Judge
United States District Court

EXHIBIT "B"

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	NO. 75-1505
	)	
BOBBY GENE DRUMRIGHT,	)	
	)	
Defendant-Appellant.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. 75-CR-53)

Morton L. Davis, Attorney for Defendant-Appellant.

Daniel T. Smith, Assistant United States Attorney (James L. Treece, United States Attorney, on the brief), for Plaintiff -Appellee.

Before McWILLIAMS, BREITENSTEIN and DOYLE, Circuit Judges.

BREITENSTEIN, Circuit Judge.

A jury found defendant-appellant Dumright guilty of passing and uttering a falsely made and altered obligation of the United States with intent to defraud, in violation of 18 U.S.C. §472. He has appealed from the judgment pronouncing sentence. We affirm.

Defendant purchased merchandise costing less than $10.00 from a Duckwall's store in Wray, Colorado. He asked the cashier whether she wanted "fifty or a hundred." She replied that she had change for the fifty. Defendant then tossed a folded bill into the drawer of the cash register. When counting the store's receipts later in the day, the manager became suspicious of the bill and notified the police. Three days earlier the defendant had used a mutilated $50 bill for the purchase of goods at the Tri-State store. The bank in which the bill was deposited separated it from the other currency because it was mutilated and later turned it over to investigating officers. Defendant was identified as having passed both the Duckwall's and the Tri-State bills.

The charge relates to the Duckwall's bill. It was made of parts of three bills fastened together with transparent tape. Both sides were portions torn from $50 bills. The middle was torn from a $1 bill. That portion of a $50 bill used for the right side of the Duckwall's bill when lying face up matches the torn edge of the Tri-State bill when seen face up. Thus, the portion torn from the left face side of the Tri-State bill was used to make the right face side of the Duckwall's bill. The beginning letter and the first figure of the serial number of the right side of the Duckwall's bill correspond with that portion of the serial number of the Tri-State bill.

Defendant complains of the admission of the two bills into evidence. He says that the Tri-State bill was irrelevant to the case. The relationship between the two bills was established. Defendant used each bill in purchasing merchandise. The Tri-State bill was pertinent to the knowledge and intent

of the defendant in passing the Duckwall's bill. The court did not abuse its discretion in receiving the Tri-State bill. United States v. Baca, 10 Cir., 444 F.2d 1292, 1294-1295, cert. denied 4 4 U.S. 979, and cases there cited. The objection to the Duckwall's bill goes to the chain of custody. Lack of positive identification affects the weight of the evidence rather than its admissibility. United States v. Wilson, 5 Cir., 451 F.2d 209, 213, cert. denied sub nom. Fairman v. United States, 405 U.S. 1032, and United States v. Rizzo, 7 Cir., 418 F.2d 71, 81, cert. denied sub nom. Tornabene v. United States, 397 U.S. 967. The court acted within its discretion in receiving the Duckwall's bill.

The elements of the offense proscribed by §472 are the passing or uttering of a falsely made and altered obligation of the United States with intent to defraud. The Duckwall's bill purported to be a Federal Reserve Note which, by definition found in 18 U.S.C. §8, is an obligation of the United States. The bill was both falsely made and altered. Defendant argues that, because part of the Duckwall's bill was worth $50, commission of the crime was legally impossible. A Federal Reserve Bank representative testified that if only the larger $50 portion of the Duckwall's bill had been presented to the Federal Reserve Bank it would have been redeemed in its full amount because it represented more than half of a $50 bill. He also testified that, in the form in which the bill had been presented to the store, redemption would not have been made. The value of the altered obligation is immaterial. As said in Errington v. Hudspeth, 10 Cir., 110 F.2d 384, 386, cert. denied 310 U.S. 638: "The alteration of an obligation of the United States with intent to defraud, which is penalized by the statute, need not be an alteration which destroys or impairs the validity of the obligation." See also Foster v. United States, 10 Cir., 76 F.2d 183, 184.

Defendant urges that the Duckwall's bill was not of an appearance calculated to deceive an unsuspecting person of ordinary observation and care and, hence, did not meet the test stated in United States v. Chodor, 1 Cir., 479 F.2d 661, 664, cert. denied 414 U.S. 912. The Duckwall's bill was a falsely made and altered obligation of the United States

because it was composed of parts of three genuine bills which had been fastened together with transparent tape. When folded with the right half of the obverse side showing, it has the appearance of a good $50 bill. The clerk at Duckwall's testified that defendant tossed the folded bill into the cash register. She did not see the front side or the other half of the back side. Although the workmanship on the bill was crude, it was of such character that under favorable circumstances it could be uttered and accepted as genuine. Those circumstances are presented in the peculiar facts of this case and are sufficient to establish a violation of the statute. United States v. Johnson, 9 Cir., 434 F.2d 827, 829.

The evidence is said to be insufficient to sustain the verdict because there was no proof of defendant's knowledge or intent. Miller v. United States, 10 Cir., 392 F.2d 790, 792, says that use of a counterfeit bill is not sufficient to convict, that knowledge and intent may be inferred from defendant's actions, and that suspicion of guilty knowledge is not enough. Here, we have more than use and suspicion. Defendant is connected with both of the $50 bills and used them to purchase merchandise. The interrelationship of the two bills is established. His explanation of how he got the bills is not convincing. The verdict of the jury must be sustained if, taking the view most favorable to the government, substantial evidence and reasonable inferences therefrom, support the action of the jury. Glasser v. United States, 315 U.S. 60, 80. Defendant argues that the evidence is insufficient because it does not exclude every reasonable hypothesis other than that of guilt. We have rejected this concept. See Golubin v. United States, 10 Cir., 393 F.2d 590, 592, cert. denied 393 U.S. 831, and Wall v. United States, 10 Cir., 384 F.2d 758, 762. The test is proof beyond a reasonable doubt. We will not disturb the verdict of the jury.

Defendant urges that the court erred in not giving his tendered instruction that the defendant was not charged with having made or altered the Duckwall's bill. It suffices to say that the instructions were complete, precise, and free from error.

Affirmed.